FEB 13
JOHN F. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 693

ALVIN M. MARKS,

Petitioner,

—v.—

POLAROID CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FLOYD H. CREWS
Attorney for Petitioner
405 Lexington Avenue
New York 17, N. Y.

DARBY & DARBY
HARVEY W. MORTIMER
Counsel for Petitioner
405 Lexington Avenue
New York 17, N. Y.

LAWYERS PRESS, INC., 214 William St., N. Y. C. 38; 'Phone: BEekman 3-2300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 693

ALVIN M. MARKS,

Petitioner,

—v.—

POLAROID CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The patents in suit (Polaroid brief, pp. 5-7)

Polaroid does not even assert that the '567 patent discloses or claims stretching in the "rubber-elastic" state, the only novelty found by the Court below. This is the patent on which Polaroid "relies mainly * * * in conducting its commercial operations" (Judge Sweeney, R. 246a, quoted by Court of Appeals at Petition, p. 15a).

POINT 1

There is little likelihood of further litigation on the patents, which completely dominate an entire industry (Petition, pp. 15, 16, 24-25a).

Polaroid brief, pages 9-11

Polaroid does not contest the fact that there is **today** no infringement of its patents by anyone, or that it now completely dominates this segment of industry.

It refers first to earlier cases in Delaware and New York in which Consent Decrees of validity and infringement were entered on its patents. Obviously those defendants are no longer infringing and could not contest validity if they did.

Its only other reference is to a presently pending action in the Southern District of New York. In that action Polaroid is attempting to enforce the judgment in the case here at bar against Depix Corporation and Alvin M. Marks, on the ground of estoppel by judgment, thereby avoiding a contest of validity. The complaint in that action is printed at pages 1a to 12a of the Motion and Brief of Matthew Fox as *Amicus Curiae* in support of this petition. On page 8a, in paragraph 20, the defendants in the New York action are all alleged to be privies of Depix "and/or" Alvin M. Marks. Paragraph 20 reads as follows:

> "20. The defendants, and each of them are subject to, and are bound by, the decree of the District Court in the Massachusetts suit, as affirmed by the Court of Appeals for the First Circuit, as privies of Depix Corporation and/or Alvin M. Marks."

There is therefore little likelihood of further litigation in which validity may be contested.

POINT 2

There is a conflict in principle with decisions of this Court as to "factually untrue" representations to the Patent Office in obtaining a patent (Petition, pp. 16-18).

Polaroid brief, pages 11-14

Polaroid attempted at the trial to justify its "factually untrue" representations to the Patent Office on the ground

that cellophane could be dyed with mercury to produce a dichroic ratio better than 25 to 1. It attempts the same justification here, on page 13 of its brief.

Dr. Land, President of Polaroid and patentee of the patents in suit, expressly admitted at the trial that "as of today" the "mercury and cellophane polarizer is no good as a practical matter" (R. 113a). This is to be contrasted with Polaroid's statement on page 13 with respect to "cellophane polarizers in accordance with the teachings of the '515 patent":

> "The patent specifically teaches that mercury gives 'very excellent results' when used as a stain" (R. 386a, col. 7, l. 21).

POINT 3

There is a direct conflict with decisions of this Court as to misuse of patents (Petition pp. 18-20).

Polaroid brief, pages 15-17

The Courts below justified an extension of the patent monopoly on the ground of Polaroid's alleged fear of a health hazard. There is clearly no health hazard for which the manufacturer could possibly have any responsibility.

If the decision below is good law, controls otherwise unlawful may be exercised in all the fields of cosmetics, food and food packaging, pharmaceuticals, toilet articles, clothing, all electrical goods including all household appliances (high voltage, short circuits), all moving machinery, all chemicals, all antibiotics, dishes, cooking and eating utensils, automobiles (fumes), etc.

POINT 4

There is conflict between Circuits on an important question which has not been, but should be, decided by this Court: the personal liability of an officer of a corporation for its infringement of a patent (Petition, pp. 20-25).

Polaroid brief, pages 4, 10, 17-21

Polaroid attempts to tie in Alvin M. Marks' activities as an individual prior to the incorporation of Depix with the corporate infringement by Depix. Judge Sweeney expressly held Alvin M. Marks had not infringed as an individual, and Polaroid took no appeal from this decision. Alvin M. Marks' activities as an individual alleged infringer are therefore not in issue here.

CONCLUSION

It is accordingly prayed that the writ be granted.

Respectfully submitted,

FLOYD H. CREWS
Attorney for Petitioner
405 Lexington Avenue
New York 17, N. Y.

DARBY & DARBY
HARVEY W. MORTIMER
Counsel for Petitioner
405 Lexington Avenue
New York 17, N. Y.

New York, N. Y.
February 15, 1957.

MOTION FILED FEB 13 1957

IN THE

Supreme Court of the United States

October Term, 1956

No. 693

ALVIN M. MARKS,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

Motion for Leave to File Brief as *Amicus Curiae*, in Support of Petition for Writ of Certiorari Filed by Petitioner, and Brief

ASHER LANS,
64 Wall Street,
New York 5, N. Y.,
Attorney for Movant.

STANLEY N. QUELER,
BASIL ESTREICH,
ARNOLD STREAM,
64 Wall Street,
New York 5, N. Y.,
Counsel for Movant.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0089

INDEX

	PAGE
Motion for Leave to File Brief	1–3
BRIEF:	
Argument	4
POINT I.—The opinion of the Court below contains a self-evident error as to the degree of invention which a patent must embody in order to be valid. In reaching its result, the Court below directly ignored the relevant decisions of this Court	4
POINT II.—The decision of the court below directly conflicts with decisions of this court, requiring invalidation of patents which have been misused to extend the patentee's monopoly	11
POINT III.—The decision of the court below directly conflicts with decisions of this court holding that patents obtained by misrepresentation must be held invalid as a matter of law	14
CONCLUSION	16
APPENDIX:	
Exhibit A	1a
Exhibit B	13a
Exhibit C	17a

CASES CITED

	PAGE
Bassick Mfg. Co. v. Hollingshead Co., 298 U. S. 415	9
Carbice Corp. v. American Patents Development Corp., 283 U. S. 27	9
Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84	8, 11
Detrola Radio & Television Corp. v. Hazeltine Corp., 313 U. S. 259	8
Dow Chemical Co. v. Halliburton Co., 324 U. S. 320, 330	9
Essex Razor Blade Corp. v. Gillette Safety Razor Co., 299 U. S. 94	9
Ethyl Gasoline Corp. v. United States, 309 U. S. 436.	12, 13
General Electric Company v. Wabash Corp., 304 U. S. 364	10
Great Atlantic & Pacific Tea Co. v. Supermarket Corp., 340 U. S. 147	8, 11
Halliburton Oil Well Cementing Co. v. Walker, et al., 329 U. S. 1	8
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238, rehearing denied 322 U. S. 772	15
Jungerson v. Ostby & Barton Co., 335 U. S. 560	9
Keystone Driller Co. v. General Excavator Co., 290 U. S. 240	15
Lincoln Co. v. Stewart Warner Corp., 303 U. S. 545	10

PAGE

Mantle Lamp Co. v. Aluminum Products Co., 301 U. S. 544 9
Marconi Wireless Telegraph Co. v. United States, 320 U. S. 1 8
Mercoid Corp. v. Mid-Continent Investing Co., 320 U. S. 661 10
Milburn v. Davis Bournonville, 270 U. S. 390 6
Morton Salt Co. v. G. S. Suppiger Company, 314 U. S. 488 12
Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502 12
Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S. 759 ..... 8, 11

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464 9
Precision Instrument Mfg. Co. v. Automatic Maintenance Mach. Co., 324 U. S. 806 15

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211 8
Smith v. Hall, 301 U. S. 216 9

Textile Machine Works v. Louis Hirsch Textile Machines, 302 U. S. 490 8
Toledo Pressed Steel Co. v. Standard Parts, Inc., 307 U. S. 350 ..... 8, 9

United Carbon Co. v. Benney & Smith Co., 317 U. S. 228 ..... 8, 10
U. S. Chemicals Corp. v. Carbide Corp., 315 U. S. 668 10
United States v. Masonite Corporation, 316 U. S. 265 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 693

ALVIN M. MARKS,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

Motion for Leave to File Brief as *Amicus Curiae*, in Support of Petition for Writ of Certiorari Previously Filed by Petitioner

May it Please the Court:

The undersigned, as Counsel for Matthew Fox, respectfully moves the Honorable Court for leave to file the accompanying brief as *amicus curiae*, in support of the petition for writ of certiorari previously filed by the petitioner. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has refused to consent to the filing of this brief.

The following special reasons are set forth in support of this motion:

The movant, Matthew Fox, has a direct economic interest in the outcome of the present litigation. Shortly after the entry of the order herein by the Court of Appeals for the First Circuit, the present respondent commenced an action against Fox and others in the United States District Court for the Southern District of New York, seeking damages of $2,000,000. for inducing infringement of and conspiracy to cause infringement of the same patents, which the District Court in Massachusetts and the First Circuit held were valid and infringed (Exhibit A, Appendix to brief, pp. 1a-12a). In the New York action, the present respondent alleges that Fox and the other defendants, including a firm of warehousemen employed in distribution, i.e., National Film Service, Inc., were in privity with the plaintiff in the Massachusetts action, i.e., petitioner herein (*Ibid*, p. 8a, Par. 20). By so asserting, the present respondent, Polaroid Corporation, seeks to prevent the validity of the patents from being litigated in another Circuit. This then may be the only opportunity for the movant Fox to question the validity of the present respondent's patents.

The court below sustained respondent Polaroid's patents, although finding that the inventions therein alleged did not involve a substantial extension of the prior art, emphasizing the "commercial value" of the most important patent to respondent. In so doing, the court below ignored decisions of this court with respect to the degree of invention which must be present to sustain a patent, particularly a patent which contains such broad claims that it admittedly, if sustained, permits the patentee to dominate an entire segment of American industry (Exhibit B to brief). Moreover, the court below ignored the decisions of this court, holding that use of a patent monopoly to require buyers of the patented article to purchase the same in excess of their needs, the making of misstatements to the patent office in the processing of patent applications, and the

consummation of restrictive market agreements with holders of existing or prospective other patents in the field, each require invalidation of a patent.

The movant submits that these over-riding issues were not adequately considered by the court below and the movant submits that examination of the briefs heretofore submitted by counsel for the parties shows that certain of these questions have not fully been presented by them. Further special reasons in support of this motion appear in the accompanying brief.

Dated: February 11, 1957

ASHER LANS,
Attorney for Matthew Fox,
Movant, Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 693

ALVIN M. MARKS,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

BRIEF OF MATTHEW FOX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

POINT I

The opinion of the Court below contains a self-evident error as to the degree of invention which a patent must embody in order to be valid. In reaching its result, the Court below directly ignored the relevant decisions of this Court.

A

The decision of the Court below directly contradicts the doctrines enunciated by this Court, as to the degree and

scope of invention which must be embodied in a patent, before it will be sustained, particularly when that patent gives its holder a monopoly over an entire segment of American industry.

The Court below, sustained as valid, certain claims of respondent's patents nos. 2,454,515, 2,328,219 and 2,237,567. It is undisputed that these patents, if valid, give respondent a virtual monopoly in the production of polarized products in the United States. (See 24-5a of Petitioner's brief). The polarized products industry is of critical importance in the production of optical sun glasses, photographic equipment, gun sights, range finders and scientific instruments, all connected with the national defense. Many of these products have frequently been in short supply. (See Paragraph 8 of Exhibit B hereto).

The essential invention, alleged in the '515 and '219 patents, according to the Court below, is that "stretching linear high polymeric material in the 'rubber-elastic' state to the 'limit of extension'" produces "better polarizers" (Pet. brief, p. 13a). The Circuit Court, however, found: "Some of the references are certainly close but we do not read the art prior to Land [the patentee] as clearly teaching or directly indicating the importance or value of stretching in any given state, although perhaps stretch 'to the limit of extension' may have been foreshadowed". (*Ibid*) The Circuit Court further found that the prior art knew "that the greater the stretch the more substantial the parallelism of the molecules became" and that an increase in parallelism increased polarization (*Ibid*). Hence it is clear that the prior art knew that the greater the extension of stretch, the greater the polarization.

The Court below found that the invention herein inhered "in the disclosure of putting the various plastic materials employed in a 'rubber-elastic' state", prior to stretch

(Pet. brief, p. 9a). However, the patent office rejected the '515 patent despite the claim as to rubber-elasticity, until the respondent misrepresented the most crucial fact relating to prosecution of its claim. (See Point III of brief). Moreover, contesting in a patent office interference proceeding, an alleged prior discovery by Bailey and Brubaker of the alleged invention set forth in the '515 patent (R. 293a), respondent introduced a memorandum by an employee, stating that the '515 process was less effective when the plastic was "very elastic" (R. 275a, 199a, 56a).

Admittedly, Land, respondent's president and the inventor of the patents held valid below, had invented a machine prior to 1935, which stretched linear plastics in the "rubbery state" (R. 109a). Patent No. 2,011,553 (R. 353a) was issued thereon on August 13, 1955, early enough to be a statutory bar to the three patents now in issue, since the first application thereon was filed on October 29, 1938. *Milburn* v. *Davis Bournonville*, 270 U. S. 390. This patent, however, while claiming stretching in the "rubbery state", does not use the words "rubber-elastic stretch", but instead refers to "pure stretch". In other words, the Court of Appeals found that invention inhered in the substitution in the patent application of the words "rubber-elastic stretch" for the prior words "pure stretch". By this standard, adroit copywriting in the drafting of patent applications has been substituted for invention as the key to patentability.

Additionally, on the same day respondent filed the '515 application, it filed an application for Land Patent 2,319,816, claiming the stretching and dyeing of glass in the plastic stage to make a polarizer, by methods and using stains identical to those disclosed in the '515 patent (R. 353a). Respondent concedes that plastic glass has no elasticity (R. 106a). Since respondent itself admits that, when stretched, the plastic glass, although admittedly totally

non-elastic, can be made into a first class polarizer, it is obvious that it is the stretchability and not the elasticity of a plastic which is the critical factor. Moreover, the Court below agreed with the District Court in finding that the '567 patent had the "greatest commercial value" (Pet. brief, p. 15a). But, as the Circuit Court said, "In this patent no claim is made of stretching in the 'rubber-elastic' state to the 'limit of extension'" (*Ibid*, p. 14a).

Upon this thin invention, the Court below made the '515 and the '219 patents a monopoly over the polarization of some 200,000 polyvinyl compounds (R. 100a), including all workable plastics (*Ibid*).

B

The respondent's third patent, No. 2,237,567 discloses a sheet of polyvinyl alcohol, stained with iodine, and stretched to orient its molecules. The Court below found the invention in the other two patents consisted only of stretching the plastic to the "limit of extension" in the "rubber-elastic" state (Pet. brief, p. 9a). However, no such claim is made in the '567 patent (*Ibid*, p. 14a). The Court below found that the entire process claimed in the '567 patent was known before the alleged date of its invention, except that the prior art described the result as a "birefringent" plastic, capable of absorbing iodine, whereas the '567 patent described the product as a polarized plastic (*Ibid*). This again is mere word juggling because as the Court below found, a birefringent plastic,* when stained with iodine, is a polarizer (*Ibid*, pp. 4a-6a).

---

*At the trial Respondent's expert, Professor Mark, testified as follows:

> "XQ. And can you stretch a plastic and orient the molecules to produce birefringence? A. Yes.
>
> "XQ. Is that stretch the same stretch you would give it if you were going to later stain it in order to produce polarization? A. It is essentially the same kind of deformation" (R. 64a).

The essential rationale by which the '567 patent was sustained and respondent was allowed to reach the Promised Land, was bluntly stated by the District Court and adopted, *in haec verbae,* by the Circuit Court: "It would be anomalous to strike down the patent which has proved to the defendant to have the greatest commercial value and save the other two patents" (*Ibid,* p. 15a).

Apart from the fact, as shown below, that this doctrine directly contradicts prior decisions of this Court, the argument is predicated upon a plain factual error. For respondent admitted that its polarizers, produced under the '567 process, worked only when it also utilized the process disclosed in respondent's re-issue patent No. 22,297 (R. 114a, 72-3a). The re-issue patent was held invalid by the trial court and no appeal was taken by respondent from that holding (fn. 1 to p. 2a, Pet. brief).

C

Where a patent dominates an entire segment of industry, this Court has consistently held that the rule, that a patent may not be sustained without a clear showing of "invention" and "genius", must be strictly applied. See *Great Atlantic & Pacific Tea Co.* v. *Supermarket Corp.,* 340 U. S. 147; *Halliburton Oil Well Cementing Co.* v. *Walker et al.,* 329 U. S. 1; *Marconi Wireless Telegraph Co.* v. *United States,* 320 U. S. 1; *United Carbon Co.* v. *Benney & Smith Co., infra; Muncie Gear Works* v. *Outboard Marine & Mfg. Co.,* 315 U. S. 759; *Cuno Engineering Corp.* v. *Automatic Devices Corp.,* 314 U. S. 84; *Detrola Radio & Television Corp.* v. *Hazeltine Corp.,* 313 U. S. 259; *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 311 U. S. 211; *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.,* 307 U. S. 350; *Textile Machine Works* v. *Louis Hirsch Textile Machines,* 302 U. S. 490; *Mantle Lamp Co.* v. *Aluminum Products Co.,* 301 U. S.

544; *Smith* v. *Hall*, 301 U. S. 216; *Essex Razor Blade Corp.* v. *Gillette Safety Razor Co.*, 299 U. S. 94; *Bassick Mfg. Co.* v. *Hollingshead Co.*, 298 U. S. 415; *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464; *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27.

The analysis of the facts contained on pp. 5-8 of this brief demonstrates that the Court below committed patent error in disregarding this Court's definition of invention as set forth in the cases cited above. The Circuit Court promulgated its own and erroneous definition, whereby it equated adaptation of prior art and commercial utility with invention. This directly conflicts with the many decisions of this Court holding that commercial utility is a make weight and does not establish patentability. *Jungerson* v. *Ostby & Barton Co.*, 335 U. S. 560; *Dow Chemical Co.* v. *Halliburton Co.*, 324 U. S. 320, 330; *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.*, 307 U. S. 350, 356.

Since respondent's patents describe processes already known in the art and the inventor's sole contribution was in realizing that these processes could be effectively utilized commercially in manufacturing light polarizers, the Court below erred as a matter of law in holding that they constituted inventions.

D

The Court below committed two other self-evident errors, in sustaining respondent's patents.

Firstly, as set forth on pp. 5-8 of this brief, the '515, '219 and '567 patents all embody elements admittedly known, and found by the Courts below to have been known, in the prior art. As such, all three of the patents are invalid under the standard set by this Court in *Lincoln Co.*

v. *Stewart Warner Corp.*, 303 U. S. 545. As stated by this Court, in *Mercoid Corp.* v. *Mid-Continent Investing Co.*, 320 U. S. 661, at 665: "* * * it is the protection of the public in the system of free enterprise which alike nullifies a patent where any part of it is invalid * * *".

Secondly, the '219 patent encompasses more than 200,000 vinyl compounds (see testimony of respondent's expert, Prof. Mark, at R. 100a), most of which do not work (*Ibid*), and names as the stain to be used all known dyes, iodine and some fifteen metals, including mercury, whether they will work or not (R. 16a, 18a, 25a). The '515 patent is even broader, purporting to encompass all linear plastics, comprising an unknown quantity, but including all the 200,000 vinyl compounds and others. The absurdity of these broad claims of invention is demonstrated by the patent's citation of mercury as one of the available stains. For Dr. Land, the inventor and respondent's President, admitted that "as of today" a mercury stain does not create a polarizer (R. 113a). This Court has repeatedly held that a patent embodying excessive claims must be held void *in toto*. *United Carbon Co.* v. *Benney & Smith Co.*, 317 U. S. 228; *General Electric Company* v. *Wabash Corp.*, 304 U. S. 364; *U. S. Chemicals Corp.* v. *Carbide Corp.*, 315 U. S. 668.

E

In the pending New York action (Par. 20, p. 8a, Ex. A), the present respondent is seeking to prevent re-litigation of the validity of the patents sustained below, by contending that the present movant, Fox, and the other defendants therein are in privity with petitioner herein. As shown at pp. 24a-25a of petitioner's brief, there is little likelihood of any other litigation on the present patents. Under such circumstances, this Court has stated that it will grant

certiorari. *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.*, 315 U. S. 759.

When the public interest is involved, this Court has shown that it is not bound by the findings of fact of the trial court, even when found by the Court of Appeals to be sustained by evidence. *Muncie Gear Works* v. *Outboard Marine & Mfg. Co., supra.* This rule originates from this Court's concern " * * * lest in the constant demand for new appliances the heavy hand of tribute be laid on each slight technological advance in an art * * * ". *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, at 92. In *Great Atlantic & Pacific Tea Co.*, v. *Supermarket Corp.*, 340 U. S., 147, at p. 156, it was stated that the standard of invention is a constitutional standard; and the question of validity of a patent is a question of law.

POINT II

The decision of the court below directly conflicts with decisions of this court, requiring invalidation of patents which have been misused to extend the patentee's monopoly.

A

The first misuse by respondent is the sale of its permanent type viewers, produced under the patents at bar, under an agreement prohibiting their resale and reuse. The facts are described and the agreement is quoted at pages 13-14 of petitioner's brief. The court below (and the trial judge) affirmatively recognized that respondent's sale contract was intended to and did require customers to purchase viewers produced under the patents, in excess of their commercial needs (Pet. brief, pp. 18a-19a).

The use of patents to force customers to purchase excess quantities of merchandise is as much a misuse of the statutory monopoly as the utilization of patents to compel tie-in purchases or to control prices. In either case the patentee is illegally extending his patent monopoly, in transgression of the public interest in preserving competitive markets. See *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Morton Salt Co.* v. *G. S. Suppiger Company*, 314 U. S. 488; and many others. The decision of the court below directly conflicts with (and did not even purport to distinguish) the above cited decisions of this court.

The court below found that respondent's restrictive sales agreement was justified because of a possible health hazard, i. e., the possibility that reuse of viewers might cause eye infection (Pet. brief, p 18a). The record contains no reliable proof as to the existence of any hazard. The restriction is exactly akin to that which would exist if a manufacturer of a patented drinking glass caused restaurant purchasers to agree that the glass could be used only by one customer. A possibility of infection, if any, in the case of respondent's polaroid viewers, just as in the case of drinking glasses, can readily be controlled by sterilization after each use. In any case it is the local governmental authorities and not respondent, who have the responsibility for safeguarding the public health. A similar public health argument was urged by the patentee in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, to justify license restrictions on resale of motor fuel produced under patents. This court held that the local authorities had the responsibility of protecting the public health, and that a hypocritical concern therefor did not justify imposition of controls on the resale of articles produced under patents.

The court below here held "The matter lies primarily in the discretion of the District Court" (Pet. brief, p. 19a). In so holding, the court below directly conflicted with and abdicated the responsibility placed upon it by this court's decision in the *Ethyl* case, *supra*.

B

Respondent has further misused the patents at bar:

1. By entering into an agreement with the leading German inventor in the field, whereby he agreed to cease operations in the United States, in return for respondent's undertaking not to compete in Germany (Exhibit B, p. 15a);

2. By the curious arrangement with E. I. duPont deNemours & Company, whereby the respondent purchased its materials from said company (R. 22a), and duPont discontinued its interference with respondent's '515 patent, based upon a previously issued duPont patent (see Pet. brief, pp. 10-11).

The failure of the court below to invalidate respondent's patents for such misuses, directly conflicts with this court's unanimous decision in *United States* v. *Masonite Corporation*, 316 U. S. 265, and with the rule therein enunciated (at p. 280) that: "Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirements of the patent statute."

POINT III

The decision of the court below directly conflicts with decisions of this court holding that patents obtained by misrepresentation must be held invalid as a matter of law.

Certain of the special facts have been set forth at pages 9 and 10 of petitioner's brief, which demonstrates that respondent, after the '515 and '567 patents had been rejected by internal action in the Patent Office, made concurrent and mutually contradictory statements as to the alleged inventions embodied therein. Only after the making of these statements were any claims of these patents granted by the Patent Office. The contradictory statements related to the crucial issue of the degree of dichroism, i. e., polarization, resulting from the two processes.

Respondent's misrepresentations were compounded upon the trial of this action. For, testifying about the '515 patent, Dr. Land, the inventor of respondent's patents and its president, admitted that the statements made to the Patent Office as to the dichroic ratio of dyed cellophane referred only to a very "special case" (R. 112a), and was without practical application (R. 113a).

The court below states that the District Court held only that the statement made to the patent office with reference to the '515 patent was "not literally true" (Pet. brief, p. 17a). What the District Court actually said was:

> "It is quite true that a misrepresentation of a dichroic ratio to the order of 25 was made which was probably stretching it beyond the limit of actual fact" (129 Fed. Supp. 243, 268).

The Court of Appeals sought to avoid the consequence of the established misrepresentation by saying that it was not "deliberate" and did not "deceive". In so doing, the court below conflicted with this court's rule that the doctrine of "clean hands" precludes extension of patent protection to a party who has performed an "unconscionable act" in procuring its patent. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240; *Precision Instrument Mfg. Co.* v. *Automative Maintenance Mach. Co.*, 324 U. S. 806.

The court below ruled that a misrepresentation to the Patent Office, if found by the District Court not to have misled that Office, was exempt from this doctrine. In so holding, the court below directly conflicts with this court's decision in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, rehearing denied, 322 U. S. 772.

In the *Hartford Empire* case, the "unclean hands" doctrine was invoked because a magazine article, written by the attorney for the patentee, was presented to the Patent Office as the alleged work of an outsider—and this in spite of the fact that every word in the article was true (322 U. S. 238, at 247). Measured by this standard, the court below committed obvious error, when it engaged in logomachy as to the deliberateness of the misrepresentation, and thereby saved patents, which it admitted were obtained by "factually untrue" representations to the Patent Office.*

---

*See Exhibit C hereto.

CONCLUSION

For the reasons set forth herein and in petitioner's brief, it is prayed that the writ of certiorari be granted.

ASHER LANS
64 Wall Street
New York 5, New York
Attorney for Movant
Matthew Fox

STANLEY N. QUELER
BASIL ESTREICH
ARNOLD STREAM
64 Wall Street
New York 5, New York
Of Counsel for Movant

New York, New York
February 11, 1957

APPENDIX

Exhibit A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMPLAINT

POLAROID CORPORATION,

Plaintiff,

AGAINST

COMMERCE INTERNATIONAL CO., INC., POLALITE CORPORATION, INTERNATIONAL SCIENTIFIC RESEARCH CORP., NATIONAL FILM SERVICE, INC., SOTIRIS G. FASSOULIS and MATTHEW FOX, individually and as co-partners doing business under the firm name and style of COMMERCE INTERNATIONAL MFG. CO.,

Defendants.

Plaintiff, by Silver, Saperstein & Barnett, its attorneys, complaining of the defendants, respectfully shows to this Court and alleges:

As and For a First Cause of Action Against All of the Above-Named Defendants

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, having a principal

office and place of business at 730 Main Street, Cambridge, Massachusetts.

2. Upon information and belief, defendant, Commerce International Co., Inc., is a corporation organized and existing under the laws of the State of New York, having an office and place of business at 19 Rector Street, New York City, within the Southern District of New York, where and elsewhere it has committed the acts of infringement hereinafter alleged.

3. Upon information and belief, defendant, Polalite Corporation, is a corporation organized and existing under the laws of the State of New York, having an office and place of business at 19 Rector Street, New York City, within the Southern District of New York, where and elsewhere it has committed the acts of infringement hereinafter alleged.

4. Upon information and belief, defendant International Scientific Research Corp., is a corporation organized and existing under the laws of the State of New York, having an office and place of business at 37 Wall Street, New York City, within the Southern District of New York, where and elsewhere it has committed the acts of infringement hereinafter alleged.

5. Upon information and belief, defendant, National Film Service, Inc., is a corporation organized and existing under the laws of the State of Delaware and qualified to transact business in the State of New York, having an office and place of business at 630 9th Avenue, New York City, within the Southern District of New York, where

and elsewhere it has committed the acts of infringement hereinafter alleged.

6. Upon information and belief, defendant, Sotiris G. Fassoulis, is a citizen of the United States with an office and place of business at 19 Rector Street, New York, New York, within the Southern District of New York; defendant, Matthew Fox, is a citizen of the United States with an office and place of business at 655 Madison Avenue, New York, New York, and residing in the County of New York, City of New York, within the Southern District of New York; and said defendants, Fassoulis and Fox, are or have been, within six years last past, co-partners doing business under the firm name and style of Commerce International Mfg. Co., with an office and place of business within the Southern District of New York, where and elsewhere said defendants, individually and as co-partners, have committed the acts of infringement hereinafter alleged.

7. This complaint arises under the Patent Laws of the United States, more particularly 35 U. S. C. Chapter 29, Section 281, as hereinafter more fully appears. This Court has jurisdiction of the parties.

8. On April 8, 1941 United States Letters Patent No. 2,237,567 was legally and duly issued to plaintiff for an invention in "Light Polarizer and Process of Manufacturing the Same", and since that date plaintiff has been and still is the owner of all right, title and interest in and to said Letters Patent.

9. On August 31, 1943 United States Letters Patent No. 2,328,219 was legally and duly issued to plaintiff for

an invention in "Light Polarizer and Process of Manufacture", and since that date plaintiff has been and still is the owner of all right, title and interest in and to said Letters Patent.

10. On November 23, 1948 United States Letters Patent No. 2,454,515 was legally and duly issued to plaintiff for an invention in "Light Polarizing Sheet of Molecularly Oriented Transparent Linear High Polymer Dyed with Dichroic Substance and Process of Manufacture", and since that date plaintiff has been and still is the owner of all right, title and interest in and to said Letters Patent.

11. In an action (Civil Action No. 53-168) entitled "Alvin M. Marks and Depix Corporation, Plaintiffs v. Polaroid Corporation, Defendant," (hereinafter called "the Massachusetts suit"), in the United States District Court for the District of Massachusetts (hereinafter called "the District Court"), a judgment was made on June 25, 1955 and filed on June 27, 1955, adjudging and decreeing that claims 1, 2, 5, 7, 8, 9 and 18 of said Letters Patent No. 2,237,567 claims 1, 2, 3, 4, 5, 6, 20, 22 and 24 of said Letters Patent No. 2,328,219, and claims 17 and 18 of said Letters Patent No. 2,454,515, and each of said claims, are valid; that Depix Corporation has infringed said claims, and each of them; and that Alvin M. Marks is also personally liable for said infringements.

12. Said judgment of the District Court in the Massachusetts suit further ordered, adjudged and decreed that a writ of injunction issue out of and under the seal of said Court directed to Alvin M. Marks and Depix Corporation, and each of them, and their and each of their officers, agents, attorneys, employees, associates, privies, succes-

Exhibit A

sors in interest, and all persons controlling or in active concert or participation with them, enjoining and restraining them and each of them from directly or indirectly infringing any of the above referred to claims in the aforementioned patents, and from offering or advertising so to do and from aiding and abetting or in any way contributing to the infringement thereof.

13. On or about the 28th day of June, 1955, said writ of injunction duly issued out of the District Court and was thereafter duly served upon Alvin M. Marks and Depix Corporation.

14. On or about the 26th day of September, 1956, the Court of Appeals for the First Circuit unanimously affirmed the aforementioned judgment of the District Court in the Massachusetts suit.

15. Upon information and belief, defendants Fassoulis and Fox, and each of said defendants, actively induced the infringements adjudged in the Massachusetts suit to have been committed by Alvin M. Marks and Depix Corporation.

16. Upon information and belief, during the pendency of the Massachusetts suit, defendants, Fassoulis and Fox, and each of them, openly and notoriously represented that they controlled said action and the defense of Depix Corporation and Alvin M. Marks to the charges of patent infringement contained in the counterclaims of Polaroid Corporation, the plaintiff herein, in said action. Defendants, Fassoulis and Fox, and each of them, contributed to and controlled such defense. Through their co-partnership, Commerce International Mfg. Co., defendants, Fas-

soulis and Fox, with knowledge of the pendency of the Massachusetts suit, acquired the assets of Depix Corporation and during the pendency of the Massachusetts suit, through their said co-partnership, manufactured and sold light-polarizing material identical to that theretofore made by Depix Corporation and identical to that which was held in the Massachusetts suit to constitute an infringement of plaintiff's aforementioned three Letters Patent. By reason of the foregoing, defendants, Fassoulis and Fox, individually, and as co-partners under the firm name and style of Commerce International Mfg. Co., were and are privies of Depix Corporation and Alvin M. Marks.

17. Upon information and belief, the capital stock of Depix Corporation was, during the period of its infringement of plaintiff's aforesaid Letters Patent as adjudged in the Massachusetts suit, wholly owned by defendant, Polalite Corporation, which dominated and controlled Depix Corporation. Defendant, Polalite Corporation, contributed to and controlled the defense of said Depix Corporation and Alvin M. Marks to the charges of patent infringement contained in the counterclaims of Polaroid Corporation, the plaintiff herein, in the Massachusetts suit. By reason of the foregoing defendant, Polalite Corporation, was and is a privy of Depix Corporation and Alvin M. Marks.

18. Upon information and belief, during and with the knowledge of the pendency of the Massachusetts suit, defendant, International Scientific Research Corp., acquired all of the capital stock of defendant, Polalite Corporation, and since the acquisition thereof has been and still is the holder and owner of said capital stock. During the pend-

ency of the Massachusetts suit, defendant, International Scientific Research Corp., dominated and controlled defendant, Polalite Corporation, which in turn dominated and controlled Depix Corporation, and contributed to and controlled the defense of Depix Corporation and Alvin M. Marks to the charges of patent infringement contained in the counterclaims of Polaroid Corporation, the plaintiff herein, in the Massachusetts suit. By reason of the foregoing defendant, International Scientific Research Corp., was and is a privy of Depix Corporation and Alvin M. Marks.

19. Upon information and belief, defendants, Commerce International Co., Inc. and National Film Service, Inc., have acted as distributors of the products manufactured by Depix Corporation adjudged in the Massachusetts suit to constitute an infringement of plaintiff's aforementioned three Letters Patent, and have acted as distributors of the light polarizing material manufactured by defendants, Commerce International Mfg. Co., identical to that adjudged in the Massachusetts suit to constitute an infringement of plaintiff's aforementioned three Letters Patent. Defendants, Commerce International Co., Inc. and National Film Service, Inc., have purchased and resold to the trade generally the said infringing products, and have joined with and contributed to said infringements of Depix Corporation and Commerce International Mfg. Co. Defendants, Commerce International Co., Inc. and National Film Service, Inc., and each of them, joined with each other in the infringements complained of, and severally and jointly contributed to and controlled the defense of Depix Corporation and Alvin M. Marks to the charges of patent infringement contained in the counterclaims of

Polaroid Corporation, the plaintiff herein, in the Massachusetts suit. By reason of the foregoing, defendants, Commerce International Co., Inc. and National Film Service, Inc., and each of them, were and are privies of said Depix Corporation and Alvin M. Marks.

20. The defendants, and each of them are subject to, and are bound by, the decree of the District Court in the Massachusetts suit, as affirmed by the Court of Appeals for the First Circuit, as privies of Depix Corporation and/or Alvin M. Marks.

21. Upon information and belief, defendants, and each of them, have been and still are infringing upon claims 1, 2, 5, 7, 8, 9 and 18 of plaintiff's Letters Patent No. 2,237,567 claims 1, 2, 3, 4, 5, 6, 20, 22 and 24 of plaintiff's Letters Patent No. 2,328,219, and claims 17 and 18 of plaintiff's Letters Patent No. 2,454,515, and each of said claims, by making, selling and/or offering for sale, and using, light-polarizing material embodying the inventions of each of said claims of each of said Letters Patent, and defendants, and each of them, threaten to continue such infringement unless enjoined by this Court.

22. Upon information and belief, defendant, Fassoulis, is or has been, during the period of the infringements herein complained of, the president of defendants, Commerce International Co., Inc. and International Scientific Research Corp., and the President, Chairman of the Board of Directors and a controlling stockholder of defendant, Polalite Corporation, and has exercised control of the activities of said defendants and is personally liable for the infringements committed by each of said defendants.

Exhibit A

23. Upon information and belief, defendants, Fassoulis and Fox, and each of them, actively induced the infringements herein complained of, committed by defendants, Commerce International Co., Inc., International Scientific Research Corp., Polalite Corporation, Commerce International Mfg. Co. and National Film Service, Inc.

24. Plaintiff has placed the required statutory notice on all light polarizing material manufactured by it under each of said Letters Patent No. 2,237,567, No. 2,328,219 and No. 2,454,515.

As and for a Second Cause of Action Against All of the Above-Named Defendants Except National Film Service, Inc.

25. Plaintiff repeats, reiterates and realleges, with the same force and effect as though herein set forth at length, each and every allegation contained in paragraphs of this complaint marked "1" to "24", inclusive.

26. Upon information and belief, in or about the month of March, 1953, defendant Fassoulis, defendant Fox, Alvin M. Marks and Depix Corporation conspired together and with other persons and corporations to plaintiff unknown, with and for the deliberate design and purpose of infringing plaintiff's aforesaid three Letters Patent in the manufacture of light-polarizing material, of incorporating such infringement material into viewers for use in connection with the exhibition of three dimensional motion pictures, and of selling the same, in infringement of plaintiff's aforesaid three Letters Patent, to the trade for such use, thereby intending to gain and appropriate to themselves

the profits from such sales and to deprive plaintiff of customers, trade and profit to which plaintiff, by reason of its ownership of said three Letters Patent, was entitled. Thereafter, defendants Commerce International Co., Inc., Polalite Corporation, International Scientific Research Corp. and Commerce International Mfg. Co., at the instigation of the defendant Fassoulis, defendant Fox, Alvin M. Marks and Depix Corporation, joined in said conspiracy and actively participated therein. The different acts and things done by said defendants, or any of them, or by Alvin M. Marks or by Depix Corporation, as herein alleged, were all steps in said design and conspiracy, in which all of said defendants and Alvin M. Marks and Depix Corporation participated, and were all done and performed for the common purpose aforesaid.

27. Upon information and belief, pursuant to said design and conspiracy, the aforementioned conspirators manufactured, or caused to be manufactured, light-polarizing material in infringement of plaintiff's aforesaid three Letters Patent, and incorporated, or caused to be incorporated, such infringing material into viewers for use in connection with the exhibition of three dimensional motion pictures, and sold, or caused to be sold, such viewers containing such infringing material to the trade for such use.

28. Upon information and belief, pursuant to said conspiracy, and with the intent and design of concealing their infringements of plaintiff's aforesaid three Letters Patent, defendant Fox, defendant Fassoulis and/or Alvin M. Marks dominated and controlled defendants Commerce International Co., Inc., Polalite Corporation, International Scientific Research Corp. and Commerce International Mfg. Co. and other firms and corporations unknown to

plaintiff, used them as instrumentalities and dummies in perpetrating said infringements, and siphoned off and appropriated to their individual benefit, through salary, dividend and other distributions or payments, the avails and profits derived by said corporate defendants and said other firms and corporations from said infringements. Thereby defendant Fox, defendant Fassoulis and/or Alvin M. Marks individually acquired and appropriated to themselves all or substantially all of the avails and profits derived from the infringement of plaintiff's aforesaid three Letters Patent, leaving said corporate defendants and said other firms and corporations substantially without assets.

29. Plaintiff sustained great loss and damage which were inflicted upon it by virtue of said conspiracy and the acts of the conspirators done in pursuance thereof, in that plaintiff lost customers and trade and was prevented from expanding and increasing its business as it otherwise could and would have done. Such conspirators intended that plaintiff should be put to expense and lose customers, trade and profits as a result of the conspiracy, and intended further to gain, and did gain, for themselves the customers, trade and profits which plaintiff lost by reason of such conspiracy. Plaintiff is unable accurately to measure and definitely state the full amount of injury which it has suffered by reason of said conspiracy, and the acts done pursuant thereto, but plaintiff has suffered damage by reason thereof in the sum of at least $2,000,000.

WHEREFORE, plaintiff demands judgment with respect to the First Cause of Action, as follows:

1. That a preliminary and final injunction issue against defendants, and each of them, their officers, attorneys, agents, servants, employees and those controlled by them,

enjoining further infringements of plaintiff's said Letters Patent No. 2,237,567, No. 2,328,219 and No. 2,454,515, and each of them, directing an accounting for and an award to plaintiff of profits and damages arising from said infringement.

2. For costs and attorneys' fees.

3. For such other and further relief as to this Court may seem just and equitable.

With respect to the Second Cause of Action, plaintiff demands judgment against defendants, and each of them, in the sum of $2,000,000, together with interest and the costs and disbursements of this action.

SILVER, SAPERSTEIN & BARNETT
Attorneys for Plaintiff
Office & P. O. Address
60 East 42nd Street
Borough of Manhattan
City of New York

Exhibit B

State of New York
County of New York—ss.:

MATTHEW FOX, being duly sworn, deposes and says:

1. I am the Matthew Fox on whose behalf the present motion has been filed, for leave to submit a brief amicus curiae, in support of the petition herein for writ of certiorari.

2. My interest herein is direct. Shortly after the entry of an order in the instant case by the United States Court of Appeals for the First Circuit, Polaroid Corporation, the respondent herein, commenced an action in the United States District Court for the Southern District of New York against a number of corporations and individuals, including myself, seeking damages of $2,000,000. (The complaint in the Southern District action is reprinted in the appendix hereto at pp. 1a-12a.) Polaroid Corporation (the respondent herein) contends that the defendants in the recently commenced New York action, including myself, are directly responsible for, contributed to, and conspired to cause the petitioner herein (and his original co-plaintiff) to infringe the same patents of Polaroid Corporation, which the District Court in Massachusetts and the Court of Appeals for the First Circuit held, in the present action, were valid and infringed.

3. It is conceded that if the claims of Polaroid's patents, sustained below, are valid, then Polaroid Corporation will be in a position to dominate the entire polarized products industry in the United States. In the Southern District action, Polaroid has sought to prevent the other defendants

and myself from questioning and attacking the validity of their patents, by contending that all were in privity with the plaintiffs in the Massachusetts action (the present petitioner and his original co-plaintiff). Polaroid is thus seeking to prevent the question of the validity of its monopolistic patents from being adjudicated in any other Circuit. Polaroid's desire to avoid further litigation upon its patents is no doubt accentuated by the slightness of invention which the District Court in Massachusetts (see 129 F. Supp. 243) and the Court of Appeals of the First Circuit (see Appendix to petitioner's brief) found to be present in the patents.

4. In addition, the present respondent, Polaroid, is using the monopoly position given it by the First Circuit's decision in an effort to exact toll from the entire motion picture industry. Thus, one of the defendants, designated in the New York action as a co-conspirator, is National Film Service, Inc., which merely acted as an independent trucker and warehouseman for the manufacturer and distributor of polarized products, competitive with those of Polaroid Corporation. In the New York action, Polaroid Corporation seeks even to stop National Film Service, Inc. from questioning the validity of the Polaroid patents, involved in the present case, by asserting that National is in privity with the Massachusetts plaintiffs.

5. In its approach to the polarized products' field, Polaroid Corporation, the present respondent, has always, with the attitude of a would be monopolist, been interested in restricting output. In January 1953, three dimensional motion pictures, requiring the use of polarized viewers by the audience, became popular. At that time I was a director of United Artists Corporation, the distributor of one

of the first 3-D pictures, "Bwana Devil" and in connection therewith I became interested in this field. United Artists, Warner Brother Pictures Corporation, Columbia Pictures Corporation, and other producers and distributors of 3-D motion pictures were confronted with the fact that there was a shortage of polarized viewers. In this connection, I had a series of conversations with Carlton P. Fuller, Vice-President and Treasurer of Polaroid Corporation, in an effort to secure an increase in the production of such viewers. Polaroid's position was simply a dogmatic refusal to undertake any steps to increase the output of such viewers.

6. Polaroid attempted to extend its monopoly internationally. My representatives attempted to negotiate with Erwin Kaesemann, a German inventor who held numerous American patents in the polarized light field, to secure his assistance in increasing output of viewers. Kaesemann advised my representatives that he had made a deal with Polaroid representatives, whereby he had agreed to cease operations in the United States, in return for Polaroid's undertaking not to compete in Germany.

7. I have spent substantially my entire business career in various phases of the motion picture industry. I know of my own knowledge, that, subsequent to the decisions of the courts below in the instant case, Polaroid has become the sole supplier of polarized viewers in the United States.

8. The field of light polarization has present, and even greater future, importance in many areas other than the manufacture of viewers. During a portion of the Second World War, I was a senior officer of the War Production Board. As a result of this experience, I learned that

Exhibit B

polarizing materials are crucial in the production of gun sights, aviators' sun glasses and other equipment important to national defense, and, during much of the war, there was a scarcity of the necessary optical material. I am informed by counsel that the present patents, if held valid, would tend to give the respondent herein, Polaroid Corporation, a virtual monopoly in the production of many of these national defense products.

MATTHEW FOX

Sworn to and subscribed before
me this 8th day of February, 1957.

STANLEY N. QUELER
Notary Public

(Seal)

Exhibit C

The testimony on deposition of Dr. Land, respondent's president and the inventor of its patents here involved, makes it clear that he used the phrase "rubber-elastic", as being descriptive of the capacity of a plastic to be stretched. Thus, he testified:

> "Q. Can plastics be softened by heat and stretched to increase their tensile strength? A. Sometimes.
>
> "Q. Is it necessary that they be stretched in the rubbery elastic state if their tensile strength is to be increased? A. I think so" (R. 45a).

Dr. Land further testified:

> "Q. Is there any way of stretching cellophane so that upon staining it becomes a better polarizer? A. Yes.
>
> "Q. Without putting it in a rubber elastic state? A. I don't know of any, I will say that" (R. 32a).

Judge Sweeney, in the District Court, attached magical significance to the phrase "rubber-elastic", making this, as pointed out (at page 5 of this brief), the basis for sustaining the '575 and '219 patents; in this regard Judge Sweeney was followed by the court below (Pet. brief, p. 13a). However, Judge Sweeney also implicitly recognized, presumably based on Dr. Land's above quoted testimony, that the inventor's use of the term "rubber-elastic" subsumed any condition in which a linear plastic could be stretched. Thus Judge Sweeney stated:

> "In other words, stretching in the rubber-elastic state is a more critical limitation than stretching in the solid unoriented state and yet the former includes the latter" (129 Fed. Supp. 243, 262).

In summary, Dr. Land's testimony makes it apparent that the use of the term "rubber-elastic" before the patent office, constituted a further misrepresentation, requiring invalidation of the '515 and '219 patents, under *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, and the other cases cited on page 15 of our brief.

Alternatively, if "rubber-elasticity" is merely an inherent quality of a linear plastic, being a synonym for stretchability, then patent claims based thereon are void under the rule of *General Electric Co.* v. *Jewel Incandescent Lamp Co., et al.*, 326 U. S. 242, citing *Ansonia Brass & Rubber Co.* v. *Electric Supply Co.*, 141 U. S. 11.